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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER PART IA PART 16

Index Number : 120295/2003

RES, BARBARA

VS.

MASTERWORKS DEVELOPMENT CORP.

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
AUG 17 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: AUG 13 2009

ALICE SCHLESINGER J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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BARBARA RES,

Plaintiff,

-against-

Index No. 120295/03
Motion Seq. No. 004

MASTERWORKS DEVELOPMENT CORPORATION, CLUB QUARTERS, INC., CLUB QUARTERS OPERATING SERVICES, LLC, and RALPH BAHNA,

Defendants.

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SCHLESINGER, J.:

In this action, which was commenced in 2003, the last remaining issue concerns defendant's Club Quarters Employee Option Plan. In the complaint filed by Ms. Res, the fourth through the seventh causes[1] of action deal with it.

Discovery now seems to be completed and before the Court is a motion by the defendants for summary judgment pursuant to §3212 of the CPLR. The plaintiff, Barbara Res, who has become an admitted attorney during the long pendency of this action, is representing herself in strongly opposing that motion.

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[1]Causes of action #1-3 alleged discriminatory practices against the various defendants, but the employment relationship, which was the predicate for these claims, contained writings which called for arbitration. Therefore, this Court decided in an earlier decision that those claims were subject to arbitration. In December of 2008, an arbitration panel granted defendants' (respondents at the arbitration) motion to dismiss, finding that Ms. Res had waived those claims. That dismissal award has nothing to do with the viability of the Option Plan allegations.

All the parties agree on the following background facts. Ms. Res, a professional engineer since 1974, with wide experience in the construction and development industry, was hired by defendant Masterworks in July of 1999 to be their Vice President of Facilities Development at a salary of $225,000 a year.

Defendant Club Quarters is a hotel company and, according to the plaintiff, it finds undervalued old buildings and renovates them into members-only hotels. Further, she describes the hotel paradigm as unique in that the company would create very small rooms, each one outfitted to the needs of the business traveler. Although the costs of construction were high, as each unit had to be fully equipped with all amenities, Ms. Res explained that such projects could easily be sold for good profit (¶6 of Res affidavit).

In January of 2001 MasterWorks Development Corporation ("MDC") issued to some of its employees a confidential "Club Quarters Employee Option Plan." On January 25, 2001, the plaintiff was granted $200,000 in options. As stated in the "Purpose" section of the Plan, this was

> offered to key employees to recognize their roles in the success of Club Quarters and in its future growth and profitability. The Plan is designed to help attract and retain superior employees and to provide these key persons with an additional incentive to maximize the success of Club Quarters.

In fact, Ms. Res states that defendants' management, particularly Ralph Bahna, the owner (of about 80% of the companies) and Al Van Ness assured her numerous times during her employment that the options would appreciate greatly

and would provide her with substantial compensation. She says she was also told not to ask for additional salary increases as the value of her options was growing and should suffice in lieu of raises.

In the early part of 2003, Ms. Res was terminated from her position as Vice President. However, she was offered the option to stay on with the company as a consultant. She accepted this offer via a letter dated February 3, 2003 from Bahna to her which she co-signed on March 14, 2003. Ms. Res began her consultancy on March 14, 2003 and ended it via a May 12, 2003 letter to Bahna. Since she was no longer affiliated with the defendants, the options, by the terms of the Plan, had to be exercised. Paragraph 10 of the Plan deals with this issue and essentially says that, assuming an option holder is not terminated for cause (and Ms. Res was not, as she left voluntarily), then the option had to be exercised at any time within three months after the date of termination.

After the May 12 letter, the plaintiff met with Frank Bahna and exchanged letters with him (see July 8, July 22, and July 24, 2003 letters). Much of this communication dealt with the value/valuation mechanism of the options. Finally, on August 8, 2003, Ms. Res wrote Mr. Bahna a letter which began as follows:

> Receipt is acknowledged of your letter dated August 4, 2002 which I received, by fax, today. Since you pointed out that my options "expire" on August 15, I wish to make it clear that it has been my intention, since my first correspondence on this subject, to exercise my options and receive the cash value that they have attained.

> Please make sure that this is properly recorded.

The thrust of defendants' dispositive motion is quite simple. It is articulated in an affirmation from counsel Matthew Tracy and elaborated upon in a second affirmation from Charles Parr, Chief Financial Officer of MDC. Tracy says the following (at ¶2):

> Plaintiff's grant of options as part of the Employee Option Plan conferred nothing on her but a right to purchase an interest in Club Quarters after vesting, or a share of the firms appreciation. But, at the time the Plaintiff left MDC, her options were valueless, as the value of the options was based on an increase in the enterprise value of Club Quarters, and the enterprise value of Club Quarters had declined some 20%.

Mr. Parr fills in some details with the following in paragraph 7 of his affirmation:

> But, at the time the Plaintiff left MDC, her options were valueless, as the value of the options was based on an increase in the enterprise value of Club Quarters, and the enterprise value had fallen from $387 million in 2001, when the plan started, to $308 million by 2004. This represented a decline in enterprise value of 20%. As a result the Plaintiffs' (sic) options were valueless.

Additionally, in defendants' memorandum of law supplementing their moving papers, counsel argues the following., factually, that Ms. Res has no claim because in addition to the option being valueless, she never fulfilled a

prerequisite, meaning she never tendered the $200,000. Legally, counsel argues that the plaintiff's unjust enrichment claim (the 5th cause of action) should be dismissed in the presence of a written contract, i.e., the Plan, and also because Ms. Res cannot satisfy its first element, that the defendants were some how enriched here.

As to her claim of conversion (the 6th cause of action), that should be dismissed, he claims, again in face of the contract and also because there is no identifiable tangible property. Finally as to her breach of contract claim (the 7th cause of action), counsel argues that virtually none of the necessary elements have been met. This is so, it is urged, because Ms. Res has not demonstrated her performance (the $200,000 tender), has not shown any breach by the defendants, and cannot show damages.[2]

The plaintiff strenuously (and largely successfully) opposes this motion. First, in a 22 paragraph notarized affidavit, she gives her own professional history and that of her time spent with the company. Then in a 49 page(!) memorandum of law (the factual statements made therein sworn to in court on June 17, 2009), Ms. Res elaborates on these "facts" and argues their legal implication.

In essence, though, there is a great deal of detail given, Ms. Res sharply disputes the defendants' main argument, that at the time she left the company in

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[2]Defendants do not specifically address the plaintiff's 4th cause of action which sounds in a request for an Accounting. However, to the extent that she prevails on any of her claims, such would be directed.

2003, the options had no value. She bases this assessment on her own deep knowledge of the operations of the company and on her opinion that during those years, between 1999 and 2003, the value of the company increased substantially. As an example of this growth, she points to the following. In July of 1993, MDC had 6 open properties and 2 partially opened ones with a total of 800 rooms. When she left in May of 2003, there were 4 more hotels, 2 in Chicago, 1 in London and 1 in San Francisco. She states that the company had added 1200 rooms.

In other words, Ms. Res charges the defendants with manipulating their books and records to show a decline in "enterprise value" which does not comport with the reality of the situation. Unfortunately, this kind of unsavory behavior by management, if it occurred here, would not be extraordinary as evidenced by tales of such manipulation or worse which everyday appear in the press.

As an example, Ms. Res addresses the one-page document attached to the Parr affirmation whose origin is unknown. This document was given to support his statement that there was a decline in "estimated enterprise value" from $387 million in 2001 to $308 million in 2004. However, Ms. Res points out that one year later, in 2005, when defendant sold only 3 of its 10 hotels, it did this for the equivalent of $278 million. Ms. Res argues that while the company claimed an unprecedented jump in profits in 2004 to account for this appreciation in 2005, in fact by analyzing the yearly financial statements, the value of the

properties sold in 2005 was not significantly greater than their asserted value in 2003.

As was mentioned earlier, plaintiff indicated in a general way how the company had grown during her tenure there. In her more lengthy memorandum, she goes into considerably more detail on what precise events occurred in those years which she says (at p. 2) "are undisputed, and which incontrovertibly prove that the company's value increased." Beside the acquisition of additional properties and the completion of major renovations to New York hotels, Ms. Res also describes additional earnings in transferable federal tax credits, long-term Real Estate tax abatements, and contracts with Internet Travel sites.

During extensive discovery, the plaintiff deposed Bahna and Parr, the latter twice. During those examinations, her counsel (and later Ms. Res herself in the opposition papers) attempted to ascertain precisely how the "enterprise value" was arrived at, but arguably to no avail. Bahna's position appeared to be his own lack of knowledge as to precisely how the numbers were actually generated, and Parr's position was that special formulas were created and used for the purpose of valuing the options which were separate and apart from how the company itself was valued.

Regarding the latter, Parr says they used nontraditional accounting methods. On page 20 of his January 28, 2009 deposition, he refers to a "draft manual... that is attempting to document the methodology." One gleans from this statement that the mechanism of evaluation was still a work in progress.

Therefore, the plaintiff's argument is that in the first instance, the objective value of the company did increase so as to enhance the value of her options, and in the second instance, the defendants, Bahna, Parr and others cooked the books to their own advantage to show that the "enterprise value" had actually declined, making the options worthless.

Along these lines, Res also argues that beside using unorthodox methods to make this calculation, the fact is that some employees did appear to receive money for their options when they left[3] and the owners of this nonpublic partnership took huge annual distributions of money for themselves, thus again artificially manipulating the actual value of the company.

It should be noted that while the plaintiff does not utilize an expert in her opposition papers which explore and point out the problems with the position of the defendants, I do not believe, at least at this stage, that she had to. See, *Zinn v. Jefferson Towers, Inc.*, 14 AD3d 398 (1st Dept 2005). It is clear that Ms. Res, a highly intelligent and experienced professional, has a great deal of knowledge into the workings of the business of hotel construction in general and of this particular company, in particular. In reply, counsel argues that the alleged facts that Ms. Res relies upon are either immaterial or not supported by the record. But he points to no specifics in this regard. In fact, the one instance he takes issue with has to do with whether or not Ms. Res received severance pay when

[3]In an additional submission, requested by the Court involving separation agreements with other employees, it is unclear precisely what these people were getting and what precisely the money represented.

she left. He says she did and Ms. Res says this was compensation for work already performed. But frankly, who cares. It has nothing to do with the value of the options.

Further, counsel (at p. 5) describes Ms. Res' recitation of wrongdoing concerning the valuation as a "simply bald, unsupported statement that cannot defeat a motion for summary judgment". But he provides no details to support this conclusory opinion.

Frankly, it is questionable here in the first instance whether defendants even make out a prima facie case of entitlement to the drastic relief of dismissal. I say that because there really is no convincing predicate for their self-serving conclusion that the options were worthless in 2003. Ms. Res aids the Court in this regard in pointing out that the methods of valuation are questionable and as important, that various back-up material is not available or has not been produced.[4] This would include records, memos, e-mails or the like which could support (or not) their conclusions as to the "enterprise value". An example of such records, according to Ms. Res, are documents shown to executives like herself in the years she worked there regarding the increase in value of these options. But they were documents that the employees were not allowed to keep. They are now allegedly gone, assuming they did at one time exist. Further, Ms. Res refers to Bahna's testimony to the effect that a new formula to replace an

[4]Defendants insist they have no other relevant documents to provide.

original one for valuing the options was never shared or shown to the employees.

I find that there are issues here to be decided by fact finders as to whether or not the options Ms. Res was given and did exercise timely pursuant to the 90 day requirement, had any value in May of 2003 when she left the company. It should be noted here that defendants' argument that Ms. Res had to tender $200,000 is foolish. The Plan spelled out a procedure by which an employee could turn in her options and receive the difference in appreciated value less 5% administrative costs. (See ¶8 of the Plan). Thus, there was no need to tender $200,000.

As to the individual causes of action, the 4th (accounting) the 5th (unjust enrichment) and the 7th (breach of contract) will remain. However, I am dismissing the 6th, sounding in conversion.

As to unjust enrichment, movant argues that this claim cannot stand in light of the contract that existed between the parties, the subject of the 7th cause of action. *Clark-Fitzpatrick, Inc. v. LIRR Co.*, 70 NY2d 382 (1987). However, it is unclear here whether, in fact, the Option Plan even is a contract, a point counsel argues in claiming that there was no consideration and no performance. The Plan itself seems to be a promise made to certain key employees, arguably in return for their continuing to stay with the company and perform well. But the employees did not sign anything. Nor were there ostensible things that they had to do to be eligible, although there were things they had to do, in a timely manner, to exercise those options.

In the situation where the existence of an actual contract is in doubt [*Farash v. Sykes Datatronics*, 59 NY2d 500, (1983)], a plaintiff can request, as she does here, alternative relief sounding in quasi-contract. Ms. Res argues that she relied on defendants' promises and assurances and the Plan itself for compensation which she earned in addition to her salary. She further urges that by defendants' improperly manipulating the books, she was denied this further compensation. And to the extent that she has been deprived of it, the company has been enriched by her loss and also by the work she performed relying on that additional compensation. Therefore, she argues it would be unjust and unfair to further deprive her of this money. Thus, I find elements for unjust enrichment are made out.

However, the conversion claim falls, because for such a claim, the plaintiff must show a wrongful taking or withholding of tangible, identifiable property. *Roemer and Featherstonhaugh P.C. v. Featherstonhaugh*, 267 AD2d 697 (3rd Dep't 1999). Ms. Res has not been able to show this as she is ignorant of the actual worth of these options. This omission is not fatal to her other claims, but it is to one sounding in conversion.

As for the breach of contract claim, while there is some question, as indicated above, whether there was ever a legally enforceable contract, if there was, then Ms. Res should be able to prove that she performed under it as a loyal employee who timely exercised her option when she left the company and is so entitled to damages which she must prove exist.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted to the extent of dismissing the 6th cause of action, sounding in conversion, and is otherwise denied. Counsel shall appear in Room 222 on September 30, 2009 at 9:30 a.m. to select a trial date.

This constitutes the decision and order of this Court.

Dated: August 13, 2009

AUG 13 2009

J.S.C.

ALICE SCHLESINGER

FILED

AUG 17 2009

COUNTY CLERK'S OFFICE
NEW YORK